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IN THE

Supreme Court of the United States

No. 71-625

RICHMOND M. FLOWERS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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No.

RICHMOND M. FLOWERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

This is a petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 23, 1971.

OPINION BELOW

The OPINION of the Court of Appeals is not yet reported and is set forth in Appendix[1] pages A1 to A66, dissenting

[1] Because of the length of the opinion below a separate Appendix has been prepared entitled APPENDIX TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS

Opinion of Circuit Judges Rives is set forth in Appendix, pages A66 to A94.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 23, 1971. A timely petition for rehearing and rehearing *en banc* was filed and was denied on October 7, 1971 and is set forth in the Appendix, pages A93 to A94.

The jurisdiction of this Court is involved under 28 U.S.C. 1254.[2]

QUESTIONS PRESENTED

1. Whether Petitioner was denied his right to trial by jury by the Trial Court's:

   a. Failing to correct, and acquiescing in, erroneous opening statements by prosecutors concerning proper constitutional function of jury regarding one of the constitutive elements of the crimes charged, and by

   b. Improperly charging the jury as to its constitutional function regarding the same constitutive element of the crimes charged, and repeating its original charge in toto in response to request from jury?

2. Whether Petitioner was deprived of his right as guaranteed by the Fifth Amendment due to the unconstitutionally summoned, selected, drawn and arrayed Grand Jury, the product of an unsupervised and illegally operated key man selector system?

FOR THE FIFTH CIRCUIT for Petitioners Flowers, Hyde and Gantt. Such document will be referred to hereinafter as "Appendix."

[2]The Circuit Court was polled at the request of one of the members of the Court and a majority of the Circuit Judges in regular active service did not vote in favor of the Petition for a Rehearing *En Banc*. Circuit Judges Gewin, Coleman and Godbold did not participate in the consideration or action on the petition.

3. Whether the failure of the District Court to provide a hearing upon the challenge of the Petit Jury by Petitioner deprived Petitioner of Due Process guaranteed by the Sixth Amendment and violated the Jury Selection and Service Act of 1968?

4. Whether massive prejudicial trial publicity deprived Petitioner of constitutional due process when tried to an unsequestered jury and when the trial judge failed to properly charge jury at the beginning of trial with reference to trial publicity; failed to interrogate jurors during trial in conformance with ABA minimum standards; failed to determine for himself whether impartiality of jury had been destroyed; improperly inquired of jury as a whole at the conclusion of trial whether they had received any prejudicial publicity; and summarily and improperly denied post trial motion to resummon jurors?

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULE INVOLVED

1. CONSTITUTION OF THE UNITED STATES:

   Article 3, Section 2, Clause 3, printed at Flowers' Appendix page 5a.

   Amendment 6, printed at Flowers' Appendix page 5a.

2. UNITED STATES CODE:

   Title 18, Sec. 1951, printed at Flowers' Appendix page 5a.

   Title 28, Secs. 1861, 1862, 1865, 1867 (a) and (d), printed at Flowers' Appendix pages 6a-8a.

3. UNITED STATES CODE: (1964 edition)

   Title 28, Secs. 1861-65, printed at Flowers' Appendix pages 8a-11a.

4. Rule 30, Federal Rules of Criminal Procedure, printed at Flowers' Appendix page 11a.

STATEMENT OF THE CASE

Petitioner, Richmond M. Flowers, pursuant to an indictment returned by a "key man grand jury", was charged with two substantive counts and two conspiracy counts of violations of 18 U. S. C. Section 1951, hereinafter referred to as the "Hobbs Act".

The grand jury that returned the indictment in the instant case was drawn from a jury box which had last been filled in 1963. At that time the clerk sent a letter to 1754 "nominators" or "key men" requesting suggestions for jurors. Included among the key men were officials of the American Legion, VFW, civic and fraternal organizations, labor organizations and Masonic lodges. Others who were solicited included bankers, judges of probate, county superintendents of education, city superintendents of education, presidents of county boards of education, Jeanes teachers and special supervisors, county boards of revenue, county agents, home demonstration agents and agricultural stabilization and conservation service officers.

The letter to the "key men" stated in part: "I know that you will give this matter your very careful consideration, and select only such men and women as you would want to pass on a case involving your life, liberty or property."

The "key men" suggested 18,715 names. The clerk then sent questionnaires to the 18,715 named. While these questionnaires made no inquiries about race, they did call for information concerning the sex of prospective jurors. Of the approximately 11,000 questionnaires returned, the clerks pared this number to 7,000 qualified jurors, excluding those who fell within one of the explicit statutory exclusions and also who fell within certain categories established by the District Judge. These 7,000 names were then combined with another 7,000 names which had been previously compiled for jury list purposes in 1959. From these 14,000 names the Jury Commissioner selected the final list of 6,000 by choosing at random the number of jurors from each of the 31 counties in the district, reflecting the proportion of the

county's population to that of the district. The Commissioner then allocated jurors to each county in four broad categories–bankers, farmers, merchants, and others–in accordance with the ratio of each category to the total population in the county. From this list of 6,000 names the grand jury venires were selected by lot.

The grand jury that indicted the petitioner was composed of 21 persons all of whom were male and only three of whom were blacks.[3]

The petit jury was selected according to the plan of the District Court for the Northern District of Alabama, adopted pursuant to the Jury Selection and Service Act of 1968 and approved by the Fifth Circuit Judicial Council, (Appendix E, A121). The jurors were selected at random from the voter registration list of all of the counties within the district. No other source was provided. The first day of trial Petitioner moved to challenge the array and to quash the venire from which his petit jury was to be drawn on the grounds that it was not selected pursuant to a plan in accord with the requirements of the Jury Selection and Service Act of 1968 and that the plan limited juror selection to lists of registered voters from counties comprising the Northern District of Alabama, thus rendering this method of selection incapable of producing the requisite cross-section of the community. The court summarily denied Petitioner's motion without a hearing.[4]

Amidst massive prejudicial trial publicity, inclusive of all media and in particular a barrage of headline publicity, a nonsequestered jury found Flowers guilty on all counts after a lengthy trial.[5]

---

[3]Such other facts that are material to the question presented are developed in II, *infra*.

[4]Such other facts that are material to the question presented are developed in III, *infra*.

[5]The facts that are material to this question presented are developed in IV, *infra*.

The dual elements of the Hobbs Act, interference with interstate commerce and extortion were vigorously contested throughout the protracted trial by interdicting cross examination, documentary evidence and affirmative testimony.

On the morning of the first day of trial, which was to last six weeks, the Court briefly oriented the jury as to its functions.[6] The prosecutor stated to the jury:

* * * * *

> If it please the Court, Your Honor, and ladies and gentlemen of the jury, at this time it is my duty under our procedure to explain to you in an opening statement the theory of the Government's case based upon the indictment that was returned by the Grand Jury.

* * * * *

> This indictment was brought under Title 18, U. S. Code 1951, called the Hobbs Act.

* * * * *

> The Hobbs Act, as it is commonly called, makes it a Federal Criminal Offense to extort money from someone either through fear of economic loss or fear of threats or bodily harm. And that is the question that you will have to determine as we go along with these incidents is, was money extorted and was it through fear of one of the elements, either economic loss, bodily harm, or what not. The question of the interstate character will be determined by the Court.

* * * * *

---

[6] Jurors in the Northern District of Alabama were not at the time of the trial in the instant case nor are they now provided with any handbook.

Counsel for Petitioner attempted in his opening statement to put in proper context the role of the Trial Court and the jury in regard to the above-described essential element of the crime charged.

In the midst of defense counsel's argument, the assistant prosecutor interrupted and objected, again asserting that commerce, and effect thereon, was for the Court to decide.

Succeeding statements by co-defendants' counsel attempted to clarify the foregoing issue.

At the close of the opening statements of the three counsels for defendants, the assistant prosecutor stated:

> I would like to reply, with the Court's permission, to very few things that distinguished counsel said to you and they may have been inadvertently misleading.
>
> It is quite true that the effect on interstate commerce is an element of this offense, but each of us has a duty to perform in this case. Counsel will introduce evidence and make objections as was stated and you will be judges of the facts and the Court will make certain determinations. And I submit to you that it is the Court's function and not yours to find, that—first that interstate commerce existed and that the act involved affected, impeded, or delayed interstate commerce.

This was objected to on the basis that it would be "the province of the jury in every instance, not the Court."

What followed concretized the fundamental prejudice injected in the jury's mind of their role as the ultimate fact-finders when the assistant prosecutor stated:

> We submit it is the Court's function to determine interstate commerce and its effects on it.
>
> THE COURT: At this time I will let it stand.

An appropriate objection was made, and the assistant prosecutor continued:

> In spite of what counsel told you, you might be vitally concerned with all the facts in the case, you need not concern yourself with commerce, interstate commerce affected, impeded, or obstructed.

Again, this was objected to and the assistant prosecutor continued.

> Your Honor, that's the Court's function.
>
> THE COURT: It may be. It is possible.
>
> Well, the Court will instruct you on the law of this case. I believe he will instruct you that it is the Court's function to determine whether or not interstate commerce has been established and affected or impeded or obstructed. If it hasn't, he will take the case away from you.

In the Trial Court's oral charge to the jury it was stated:

* * * * *

> Now, Ladies and Gentlemen of the jury, it is the duty of the Court and not the jury to determine whether the Government's evidence, if believed, establishes that interstate commerce was affected by the conduct of the defendant so as to bring the activities of the defendants within the scope of the Hobbs Act and sustain federal jurisdiction.

* * * * *

> I instruct you that if you find from the evidence, beyond a reasonable doubt, that a conspiracy existed as charged in Count One or in Count Two or in both Counts One and Two of the indictment, and that one of the overt acts charged in each count was committed, that the Court has found, as a matter of law, that the requirements of the Hobbs Act under Section 1951 of Title 18 of the United States Code have been met as to interstate commerce being affected.

* * * * *

The Court continued commenting on certain testimony relating to the extortion aspects of Count Three and then stated:

> Now, as to Count Three, I charge you that if you find from the evidence, beyond a reasonable doubt, one or more of the defendants named in this count, to be guilty as charged, the Court has found, as a matter of law, that the requirements of the Hobbs Act, that interstate commerce has been affected, has been met by the government's evidence, if believed.

* * * * *

The Court continued with commenting on evidence regarding extortion as to Count Four and then stated:

* * * * *

> As to Count Four, I charge you that if you find one or more of the defendants named in this count to be guilty from the evidence presented to you, beyond a reasonable doubt, the Court has found, as a matter of law, that evidence in connection with Count Four, if believed, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants having affected interstate commerce, and thereby sustaining the Court's jurisdiction within the scope of the Hobbs Act.

* * * * *

In final summarization the Court stated:

* * * * *

> Now, extortion and commerce, as defined in the statute, are essential elements of proof that the Government must meet before an offense can be proven under Title 18, Section 1951.
>
> Whether or not commerce has been affected is a matter of law for the Court to determine from the evidence, if believed.

> The proof of extortion by the evidence beyond a reasonable doubt is a matter for you, the jury, to determine.
>
> * * * * *

On behlaf of each defendant, separately and severally the foregoing charges to the jury were excepted to:

> I think the import of what Your Honor has said eliminates from the mind of the jury that they have the prerogative, if they do not believe the evidence relative to the existence of commerce or any affect on commerce, affect on commerce, to reject that evidence. I would feel that under this instruction they wouldn't think they had that right.

The jury began its deliberation at four-fifteen p.m. on February 26, 1969. At five-thirty p.m. on the same day, the Court excused the jury until nine-thirty the next morning. At eleven-ten a.m. February 27, 1969, the Court informed all counsel that "Gentlemen, I have a request from . . . the foreman of this jury, in which he has stated that the jury wishes the Court to instruct them again on the law of conspiracy." Whereupon, the Trial Court read the entire charge previously given again to the jury.[7]

---

[7] An unidentified juror requested that *all* of the instructions of the Court to the jury be read again. The Trial Court proceeded to read the previously objected-to instructions again in toto with one additional exception "and right here, I didn't tell you yesterday, but the indictment lists the dates of the Conspiracy in Counts One and Two." Following the objection of counsel, the Trial Court stated to the jury: "Counsel has called my attention to the fact that I did not state yesterday, ... I stated the indictment lists the dates of the conspiracy. The Court did not mean to state to you that the conspiracy existed. That's for you to determine. And I should have said the alleged conspiracy. . . ." Whereupon, the Court's actions were again objected to on behalf of the defendants, separately and severally, and were again overruled by the Court.

REASONS FOR GRANTING THE WRIT

I

The instant case presents an issue of far-reaching importance in regard to the minimal standards for criminal justice relating to the responsibility of a Federal District Court Judge to enforce and preserve the rights of a person accused of a crime to have his guilt or innocence determined by a jury in conformance with the provisions of the United States Constitution, Article III, Section 2, Clause 3 and the Sixth Amendment, as well as clarifying the prevailing confusion regarding the interrelationship of these responsibilities to Rule 30 of the Federal Rules of Criminal Procedure. The issue is also of particular importance in the proper judicial administration of the Hobbs Act.

It has been recently stated that there is a "delicate balance between the rights of society and defendants accused of crimes . . . . We can strengthen the hand of the peace forces *without compromising our precious principle* that the rights of individuals accused of crimes must always be protected." (Emphasis added).

Unquestionably, one of the most precious principles is the right to trial by an impartial jury[8] which is, as it has been so aptly stated:

> [T]oo firmly established in American jurisprudence to allow it to be whittled away by the legislature or by a too liberal construction of statutory law by the courts. Once the door is opened for allowing the opinion of the court to be impressed upon jurors that one charged with crime is guilty of the offense, the fundamental right of trial by jury is impaired . . . the trial judge should not express an opinion as to what he thinks the verdict should be, or how he

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[8] "Our forefathers considered that right of such importance that it was guaranteed twice, first in Article III, Section 2, Clause 3 of the Constitution and then in the Sixth Amendment." Dissenting opinion, Circuit Judge Rives, Appendix page A67.

thinks the jury should decide the case. *People v. Bigge*, 297 Michigan 58, 72, 297 NW 70 (1941).

This Court has determined that there are two essential elements which a jury must determine in a prosecution under the Hobbs Act, namely, interference with interstate commerce and extortion, and both questions must be submitted and determined by the jury. *Stirone v. United States*, 361 U. S. 212, 218, 215. A judge cannot impinge upon that right any more than he can destroy it. *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U. S. 395, 408; *Compton v. United States*, 377 F.2d 408, 411 (8th Cir. 1967); *Billeci v. United States*, 184 F.2d 394, 403 (D. C. Cir. 1950); *Mims v. United States*, 375 F.2d 135, 143 (5th Cir. 1967).

Further, a defendant accused of a crime is entitled to have his guilt or innocence determined by jury in accordance with the Constitution and the Federal Rules of Criminal Procedure. *Bollenbach v. United States*, 326 U. S. 607, 614, 615. In accordance with such mandate, it is not competent for a Trial Court in a criminal case to direct a verdict of guilty even though there be no facts in dispute. *Sparf and Hansen v. United States*, 156 U. S. 51. What is forbidden to be done directly may not be done by indirection. *Peterson v. United States*, 213 Fed. 920 (9th Cir. 1914).

The jury must be free and unfettered to decide *all* questions of fact upon which guilt depends, including whether the prosecution has proved "beyond a reasonable doubt every essential element of the crime charged." *Schwachter v. United States*, 237 F.2d 640, 644 (6th Cir. 1956). For the Court to tell "the jury what the facts were as the Court itself had decided them to be" is an unlawful invasion of the jury's function. *Hardy v. United States*, 335 F.2d 288, 290 (D. C. Cir. 1964). Presentation of the standard charge that it is for the jury to determine the facts cannot eradicate the effect of the removal from the jury of a portion of its fact-finding function. *Blunt v. United States*, 244 F.2d 355, 366 (D. C. Cir 1957); *Buchanan v. United States*, 244 F.2d 916,

920 (6th Cir. 1957); *United States v. Manuszak,* 234 F.2d 421, 424 (3rd Cir. 1956).

Thus, in *United States v. Gollin,* 166 F.2d 123, 125 (3rd Cir., 1948) specifically condemned a charge to a jury which stated:

> [T]hat as a matter of law the truck was moving in interstate commerce at the time it is contended by the Government that the beer was stolen therefrom. That is a matter of law. The facts *are not* disputed and that constitutes the jurisdiction of this Court and is a matter for this Court to determine and not a matter for the jury to determine. (Emphasis added).

Further, the Circuit Court noted that, as in the instant case, interstate commerce which gave the Court jurisdiction was a major element of the alleged crime. The Court observed the instruction should have been "That if *they* [*the jury*] believe the specified Government evidence then as a matter of law the truck was moving in interstate commerce at the particular time." *Id.* at 126. (Emphasis added).

It is of course, axiomatic that under Rule 30 of the Federal Rules of Criminal Procedure that a Federal Judge in addition to stating the law may summarize and comment on the evidence. However, if he does so, he has a duty to avoid any intrusion on the accused's fundamental constitutional rights under Article 3, Section 2, Clause 3 and the Sixth Amendment. As stated by former Chief Justice Hughes:

> In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." *Quercia v. United States,* 289 U. S. 466, 469.

Further, when electing to proceed under Rule 30, there is a duty to remain completely impartial when commenting on the evidence. Judge Orie L. Phillips succinctly phrased the obligation of the Court as follows:

> He should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but *impartial, dispassionate, and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts. Minner v. United States*, 57 F.2d 506, 513 (10th Cir. 1932). (Emphasis added).

A corollary duty of the Trial Court is to ensure if juror orientation at the outset of the trial is presented to make certain that such orientation does not impinge on the unfettered right of the "unrobed Judges of the facts." An example of the grave concern regarding juror orientation is succinctly set forth in the American Bar Association Project On Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury (Approved Draft, 1968), § 4.6(a).[9]

In weighing the delicate balance, the dissenting opinion found it sufficient to assay the facts as demonstrating that, with the Trial Court's acquiescence at the opening of trial and by virtue of the Court's oral charges, there was a directed verdict in effect in regard to "interstate commerce affected,

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[9] "The standard takes the position that juror orientation is desirable and that it is preferable that it be accomplished by the use of juror handbooks rather than by extemporaneous oral instructions. The latter device has been subjected to continuing criticism. The chances of an erroneous or predjuicial statement are considerable when jurors are given their orientation by extemporaneous statement. See *People v. Izzo*, 14 Ill. 2d 203, 151 N.E.2d 329 (1958). 'Oral instructions by the Court are not a good solution to the problem. They are subject to the difficulties inherent in any extemporaneous speech. A slip of the tongue, poor phrasing or the unconscious insertion of a loose or erroneous statement of the law is infinitely more likely to occur when oral preliminary indoctrination is attempted.' Comment, 8 DePaul L. Rev. 393, 403-04 (1959)."

impeded, or obstructed." This Justice Rives found to be in conflict with the prior teachings of this Court and relevant implementing Circuit Court decisions. *Sparf and Hansen v. United States, supra; United States v. Hayward,* 420 F.2d 142 (D.C. Cir., 1969); *United Brotherhood of Carpenters and Joiners of America v. United States, supra; Mims v. United States, supra; Stirone v. United States, supra,* Appendix pages A68-A76.

As pointedly observed by Circuit Judge Rives in his dissent in the instant case:

> Thus, before the jury heard any evidence, it was informed by the United States Attorney, with the concurrence of the District Judge, that '* * * you need not concern yourself with commerce, interstate commerce affected, impeded, or obstructed,' and further 'I believe he will instruct you that it is the Court's function to determine whether or not interstate commerce has been established and affected or impeded or obstructed.' The impression which these statements of Government counsel, tentatively approved by the Judge, inevitably had on the minds of the jurors was never removed throughout the six weeks trial. Was it not natural for the jurors to accept the invitations of the United States Attorney that 'you need not concern yourself with commerce, interstate commerce, affected, impeded, or obstructed'? Further the prediction of the United States Attorney that ' * * * he [the Judge] will instruct you that it is the Court's function to determine whether or not interstate commerce has been established and affected or impeded or obstructed' turned out to be a true prophecy. In four separate parts of his charge to the jurors, the District Judge instructed them precisely as had been predicted by Government counsel . . . . Appendix page A78.

In addition, in response to a question from the jury, the entire charge was repeated again.

The majority opinion in weighing the balance raises precedential issues of widespread and disturbing proportions.

That opinion does not weigh in the balance the opening statements of counsel and the failure of the Trial Judge to correct, after objections, such statements.[10] In fine, the majority, it is submitted, attempts to avoid the basic constitutional issue by equating "if believed" to "if the jury believed." It notes that the Trial Judge underlined in red "if believed" in the charge, but the jury did not see or take out the charge with it. Appendix page A48.

Most disturbing however is the majority's basic premise that the charge was appropriate in light of the decisions of *Hulahan v. United States*, 214 F.2d 441 (8th Cir. 1954), *cert. denied*, 348 U. S. 856; *Nick v. United States*, 122 F.2d 660 (8th Cir. 1941), *cert. denied*, 314 U. S. 687. Appendix page A43. A review of Flowers' Appendix pages 3a-4a, "Comparison of Relevant Jury Charges" makes it manifest that no previous Hobbs Act case has gone as far as the instant case in eroding an accused's constitutional rights.[11]

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[10]The patently prejudicial aspects of the prosecutor's opening statements can be readily perceived when one reviews and compares the opening statement of the prosecutor in *Stirone* which clearly and correctly met the minimal standards for criminal justice. See Flowers' Appendix pages 1a-2a.

[11]The legislative history of the Hobbs Act reflects clearly that its purpose was to provide protection to the public of the United States which went beyond the Sherman Antitrust Act: "The Sherman Antitrust Act is too restricted in its terms and the penalties thereunder are too moderate to make that Act an effective weapon . . . . The anti-racketeering bill would extend the Federal jurisdiction in those cases where racketeering actions are related to interstate commerce and are therefore of concern to the Nation as a whole." (See Report No. 1833, 73rd Congress, 2nd Session. 1934 and Senate Report No. 532, 73rd Congress, 2nd Session, 1934). Obviously, effects on interstate commerce is a jurisdictional element of any criminal violation of Sections 1 and 2 of the Sherman Act. It is quite clear, however, that such issue also is an ultimate issue of fact to be determined by the jury. Note: Criminal anti-charge charge set forth in Flowers' Appendix pages 3a-4a.

Finally, and potentially most disturbing, the implicit and explicit umbrella placed over the Trial Court's actions by virtue of Rule 30 of the Federal Rules of Criminal Procedure only adds to the present confusion existing concerning the relationship of Rule 30 and an accused's rights under the United States Constitution, Article III, Section 2, Clause 3 and the Sixth Amendment.[12]

In addition, the majority opinion does not place in the balance the sequence and organization of the Trial Court's charge, the nature of the Trial Court's summation of the evidence, and instructions on essential questions of law which were repeated twice in toto.[13]

The essence of the error in the present case was that, " . . . the District Judge and the Government seem to have been laboring under the delusion that the issues of interference with commerce went to the jurisdiction of the court, and hence was for the court to decide." Dissenting opinion, Circuit Judge Rives, Appendix page A80.

It is submitted that the majority opinion perpetuates this erroneous view.

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[12]The confusion existing in regard to Rule 30 and the scope and functions of the judge and jury is succinctly set forth in Volume 8, MOORE'S FEDERAL PRACTICE, Paragraph 30.05. In this regard note the divergence between the Majority and Dissenting opinions in the case at bar:

> "The defense made no effort to contradict the facts relied on in finding interstate commerce affected." Majority opinion, Appendix page A49.

> "I agree that the evidence was sufficient from which the jury could properly have found the defendants guilty. However, it was also within the province of the jury to find them not guilty." Dissenting opinion, Appendix pages A66-67.

[13]The divergence of opinions regarding these issues are succinctly set forth and summarized in Volume 5, Orfield, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES, Sections 30:12 and 30:13.

II

Circuit Justice Rives expressed strong misgivings as to the composition of the grand jury.[14] Petitioner, concurring in this conclusion, submits that the grand jury in the instant case was the unfortunate result of a defectively functioning key man system unconstitutionally summoned, selected, drawn and arrayed.

The letter[15] sent to the key men purported to delegate to them a vital part of the clerk's well settled affirmative duty to implement a system that would probably result in a fair cross-section of the community being placed on the jury rolls. *Rabinowitz v. United States* 366 F.2d 1, (5th Cir., 1966). In reality the letter did not impose upon the key men any such obligation especially in light of its instruction to "select only such men and women as [they] would want to pass on a case involving [their] life, liberty or property."[16]

It is of consequence to note that in *Brooks v. Beto, supra,* at page 24 the majority opinion states that "the conscientious judge, instructing the juror selection group would be on sound ground in charging the body in terms

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[14]Dissenting opinion, Circuit Judge Rives, Appendix page A92.

[15]Appendix D, page A113, Exhibit 1.

[16]The majority opinion acknowledged the potential impropriety of this challenged instruction to the key man. Among the reasons the Court cited for dismissing the possibility of an unfair result emanating from the letter was that the challenged statement did not stand alone but must be viewed in the context of the whole letter which contained the admonition that the jury list was to be completed without regard to race, creed, sex or politics. It is submitted that this position of the Circuit Court cannot withstand the effect of close scrutiny. Viewing the letter in its total context it is evident that there was no caution or warning of any sort directed to the key men recipients of the letter. There was no reminder of any constitutional guidelines. The challenged instruction did indeed stand alone.

of [what the court had concluded was] the dual constitutional imperative. . . ." How uncompelling by comparison was the letter sent to 1754 unsupervised "key [lay] men" not under oath or other obligation to be impartial, devoid as it was of any language remotely approaching traditional constitutional guidelines? In the absence of meaningful guidance, how capricious would it be to conclude that the clerk's subjective advice became a motivating influence—a subtle invitation to bias conjuring up visions of the key man's life, liberty and property being exposed to the judgment of those he now had within his own power to select? It cannot be doubted that the subjective statement was directed solely to the key man's self interest rather than the interest of the community as a whole.[17] Realistically, it would be violent assumption and contrary to human experience to conclude that even key men truly representative of a cross-section of their community, unsupervised and in fact misguided by a letter of instruction as to their obligation, could not be influenced to react in a non-representative fashion.

The foregoing infirmities inherent in the subjective statement were not without their statutory counterpart. *Rabinowitz v. United States, supra,* stands for the proposition that Federal statutory standards [in that case as in the instant case concerning 28 U.S.C. Sec. 1861 et seq. reproduced in Flowers' Appendix pages] may not be treated as minimal qualifications to which jury officials may add their own concepts of appropriate and supplementary subjective tests.

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[17]The legal problems implicit in this situation become even more acute when one considers to whom the clerk's questionnaires were directed. (Appendix D, A111-112, Affadavit of William E. Davis, Clerk) The organizations, institutions, groups and individuals involved are for the most part comprised of the leaders of the established white male community. Startlingly neglected, especially in light of prevailing legal precedent were black organizations (only one, the "Jeanes teachers" was solicited for prospective jurors), women's groups, the poor, organizations catering to eligible young people, wage earners outside of organized labor, and the unemployed.

As Circuit Judge Rives stated in his opinion "Federal qualifications are objective and precise, requiring in their application no discretion on the part of the court clerk and the jury commissioner." *Rabinowitz, supra* at page 54.

The majority opinion in the instant case attempted to curtail the scope of *Rabinowitz, supra* when faced with the proposition that the challenged instruction ran afoul of that decision. It cited *Hunt v. United States* 400 F.2d 306 (5th Cir., 1968) as an instance where it refused to reverse judgments involving similar extra-statutory standards used in the selection of Federal juries. Curiously enough the letter in *Hunt* was not at all similar to the one in the instant case as it requested key men to "make a conscious effort to include both men and women from a variety of backgrounds and occupations so as to give . . . *a representative cross-section of [their] community.*" *Hunt, supra,* at page 309 [Emphasis added]. This the *Hunt* Court concluded did not purport to authorize discretionary or impermissible judgment on the part of the key men. Clearly the Fifth Circuit was correct in *Hunt* in that the instruction was certainly not directed toward the key man's individual interest and rather appropriately included the constitutional imperative; the former element is present in the instant case, the latter as previously discussed is most certainly absent. The Tenth Circuit in *Nolan v. United States* 423 F.2d 1031 (1970) squarely faced the issue of whether or not challenged instructions sent in a key man letter constituted an unwarranted infringement of a Federal statute. In that case it was concluded that the language that prospective jurors "should be good citizens and representative of the various interests in the community. . . . Please use your own good judgment.", did not constitute illegal instruction because the key men fairly represented a cross-section of the community *and because* there was nothing in the letter that could be construed as authorization for the key men to set up their own personal, subjective standard for juror qualifications.

The Tenth Circuit was not prepared to agree with the Fifth Circuit's view in the majority opinion in this case. Specifically, that even highly subjective standards may not be struck down as improper *unless* a small group of jury selectors make little or no effort to obtain a fair cross-section of the community resulting in gross underrepresentation of blacks in the jury system.[18] It is respectfully submitted that such a standard, looking primarily toward end result and permitting all but the most highly subjective statements, certainly reduces the exercise of relevant judgment and eliminates the uncontrolled caprices of chance. *Cassell v. State of Texas,* 339 U.S. See also *Brooks v. Beto, supra,* at page 22.

The use of 7,000 stale names from the 1959 jury list of *Rabinowitz* and 7,000 slightly less stale names from the list chosen in 1963, in order to arrive at the jury pool from which the grand jury was chosen, resulted in systematic and purposeful exclusion of young people and disregarded prescribed standards for jury selection.[19]

Use in 1968 of the combined lists drawn in 1959 and 1963 respectively, resulted in the systematic exclusion of young people from the ages of 21 up through and including 25 years of age.[20] The vital significance of this conclusion is undeniable: using the 1960 population of the Northern District as a statistical base,[21] in 1968 approximately 20% of the individ-

[18]See majority opinion, Appendix page A21.

[19]There are other aspects surrounding the staleness of the 1959 and 1963 names which reveal some additional infirmities inherent in this system. With reference to women, see *White v. Crook* 251 F. Supp. 401 (M.D. Ala. 1966). Under these conditions it might be safe to conclude that representation by women on the 1959 and 1963 lists was not reflective of their actual proportional representation (52.6%) at the time of the 1960 census. Also the large mobile sector of the population was excluded. C.F. the Report of the 1968 Act *Cong. Rec.* E3685-92 (daily ed. May 6, 1969).

[20]United States Code (1964 edition), 28 U.S.C. Sec. 1861, *et. seq.*

[21]1960 Census of the Population, Volume 1 Characteristics of the Population, Part 2, Alabama–U. S. Dept. of Commerce, Table 27.

uals eligible to be considered as prospective jurors were systematically excluded under this system prior to any inquiry as to other aspects of eligibility, simply because they were not to be found on the 1959 and 1963 jury lists.

The fact that young adults, commencing at the eligible age of 21, constitute a cognizable group that must be recognized by jury officials, has been conclusively settled in *United States v. Butera* 420 F.2d 564 (5th Cir., 1970). Purposeful discrimination exists whenever significant unexplained disparities exist, *United States v. Butera, supra.* Jury commissioners are responsible for the natural result flowing from their conduct. *Rabinowitz v. U.S., supra.*

A further objection to the jury selection sytsem responsible for the grand jury in the instant case was the discretionary and meaningless division of the population into four categories–bankers, merchants, farmers and others. There can be no rational objective served by this categorization. On its face it would seem to have no value in constructing an authentic cross-section of the population and in fact is skewed against including sociologically important segments of the community. For example, it would appear that this process had a double exclusionary effect on women.

In 1960 women constituted over 50% of the total population of the thirty-one counties comprising the Northern District of Alabama.[22] 1960 county by county figures for the Northern District reveal that approximately only 4.4% of the farmers and or farm managers were women. On a statewide basis, the 1960 census reveals that approximately only 14% of the bankers, 21% of the merchants and 6% of the farmers were women.[23] Another interesting statistical

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[22] *Ibid.*

[23] As a further indication of the irrelevance of the broad categories chosen by the clerk, the county by county 1960 U. S. Census statis-

comparison reveals that in 1960 women comprised only 31% of the total employed population of the counties of the Northern District of Alabama. Thus it would appear that by isolating three distinct employed groups—bankers, merchants and farmers—and allocating jurors to each county in proportion to the number of people in these categories, that women were once again systematically denied proportional representation.

The clerk Mr. William E. Davis and the jury commissioner Mr. James H. Jones were deposed[24] concerning the inclusion of women and blacks on a usual venire. Mr. Davis estimated that on the average only about 7.4% of the jurors were usually women. Mr. Jones estimated that only 20% of the jurors were usually women. This gives further credence to the argument that the administration of the system systematically excluded women.[25] Petitioner submits that in light of the above and also in light of the fact that no women served on the indicting grand jury that

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tics for the Northern District appear to have no readily identifiable breakdown which specifically isolates bankers and merchants. Some information does exist in this regard, however, with reference to these occupations on a state-wide basis, although the categories listed in the statewide compilation also are not easily isolable.

[24] Appendix A9.

[25] In regard to this issue it is interesting to note that the majority opinion Appendix A9 places little reliance on the clerk's and the jury commissioner's conclusions concerning representation by women and blacks on the usual venire describing them as "uncertain conclusions drawn from two last-minute depositions." An apparent curious ambivalence in the Circuit Court's position is discovered however when compared to its conclusions in the majority opinion Appendix A22 which cited the clerk's depositions as authority for determining that the key men were representative of a cross-section of the community. Should the clerks' depositions be any more relevant on page A22 of the majority opinion than on page A9 of the same opinion?

a *prima facie* case, of purposeful discrimination has been established. *United States v. Butera, supra.*[26]

Petitioner respectfully submits to this Court that this key man jury selection system responsible for the indicting grand jury systematically and intentionally excluded judicially cognizable groups in the community from being considered as prospective jurors. Furthermore, Petitioner respectfully urges that the administration of this key man jury selection system responsible for the indicting grand jury provided numerous "clear and ample opportunities for discrimination," an issue which has concerned this Court on many occasions. *Avery v. Georgia* 345 U.S. 559. Petitioner asserts that the admonition of *Glasser v. U.S.* 315 U.S. 60 should obtain here wherein it was stated "tendencies no matter how slight towards the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted." Petitioner, in conclusion, contends that these forbidden tendencies are manifestly evident in the system as it operated here and that these, in combination with the imposition by jury officials of a subjective standard exceeding the statutory standard, resulted in an unconstitutionally summoned, selected, drawn and arrayed grand jury.

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[26]The clerk and the jury commissioner in their deposition [see Footnote 24 *supra*] also estimated that blacks usually comprised only between 6.1 to 10% of the *average* venire. The indicting grand jury was approximately 14% black. However, the 1960 Census reveals that in the Northern District blacks accounted for 20.8% of the population. Once again *prima facie* case of discrimination has been raised.

III

Circuit Judge Rives expressed strong misgivings concerning the composition of the petit jury.[27] Petitioner, similarly concerned, on the first day of trial moved to challenge the array and to quash the venire from which the petit jury was to be drawn. The grounds for the challenge were that the venire was not representative of a cross-section of the community because of the excuses and exemptions established in the jury selection plan *and because* "the selection of the venire [in the instant case] pursuant to the attached Exhibit A [Plan Of The U.S. District Court For The Northern District of Alabama For The Random Selection Of The Grand And Petit Juries] effectively deprive[d] [the Petitioner] of due process as accorded by the Fifth Amendment to the Constitutional guarantee of a trial by jury and contravene[d] and violate[d] the Jury Selection Act of 1968."[28] The Trial Judge summarily denied the motion without a hearing,[29] apparently because he thought that the plan for the Northern District of Alabama having been approved by the Fifth Circuit Judicial Council precluded a party from challenging the plan in the District Court.[30]

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[27]Dissenting Opinion, Appendix A92.

[28]The Majority Opinion Appendix A23 concluded that Petitioner's motion was directed solely to the excuses and exemptions established in the jury selection plan. However, the motion found in the Appendix in the U. S. Court of Appeals for the Fifth Circuit, *U. S. v. Hyde* pages 157-175 and especially paragraph 6 page 160 seemingly attacks the operation of the plan as a whole.

[29]28 U. S. C. Sec. 1867 (d).

[30]Majority Opinion, Appendix A26, footnote 23.

Petitioner submits to this Court that the statutory mandate prescribing voter lists as a sole source for names is defective in that it fails to achieve a cross-section of the community. Petitioner asserts that statistics for the Northern District of Alabama reveal that over 38% of the white voting age population is registered to vote, while only approximately 55% of the black voting age population is registered to vote. This gross disparity gives strong indication that voter lists in this Judicial District are not a sufficient source for the jury list.

Furthermore, Petitioner contends that the issue of denying his constitutional objection to the jury system's sole reliance on voter lists amounts to plain error.[31] In support of this contention Petitioner asserts that the history of racial discrimination in the South is a judicially noticeable fact.[32] Further, that a jury selection system may be constitutionally infirm even though the result of use of the system in a particular case is a fair cross-section of the community.[33] *Brooks v. Beto, supra,* at page 22 footnote 40.

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[31] Federal Rules of Criminal Process, Rule 52, 18 U.S.C.A. Rule 52.

[32] See, e.g., *Goldsby v. Harpole,* 263 F.2d 71, 82 (5th Cir. 1959), *cert. denied,* 361 U.S. 828; *Meredith v. Fair,* 298 F.2d 696, 701 (5th Cir. 1962), *cert. denied,* 371 U.S. 828 *Seals v. Wiman,* 304 F.2d 53 (5th Cir. 1962), *cert. denied,* 372 U.S. 915 and 924, *Smith v. Paris,* 257 F.Supp. 901, 904 (M.D. Ala. 1966), *modified and aff'd,* 385 F.2d 979 (5th Cir. 1967) (and cases there cited); *United States v. Louisiana,* 225 F.Supp. 353 (E.D. La. 1963), *aff'd,* 380 U.S. 145.

[33] It was the Circuit Court's contention that the exclusive use of names from voter lists did not rise to the level of plain error because blacks constituted 14% of the source of the random selection of the jury lists while they constituted 20% of the adult population of the District. The Court concluded that this underrepresentation was not so great so as to reflect unconstitutional discrimination against blacks or mere token inclusion. It is submitted that the above cited precedents in combination with the great disparity between white and black voter registration sufficiently refutes this contention. Majority Opinion, Appendix A25-A26.

IV.

The issue of trial publicity in this case is a matter of singular importance to Petitioner. That this case was accorded massive and pervasive publicity is beyond contention.[34] That the procedural disposition throughout the trial and at the conclusion of the trial of this issue is a matter for great concern is likewise beyond contention.[35] That Petitioner Flowers because of his career as a public figure was uniquely prejudiced by the publicity in this case cannot be disputed.[36]

The record of this case, especially that part relating to the voir dire examination, is replete with specific examples

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[34] Majority Opinion Appendix A60. See also headlines and articles submitted as Exhibits in this case.

[35] The Circuit Court in its majority opinion expressed concern with the following situations that arose during the trial:

1) It strongly implies that the Trial Court's charge to the jury concerning trial publicity was not understandable and cited as preferable the language suggested by the American Bar Association's Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, Section 3.5(f).

2) It was disturbed that the trial judge described as facetious Petitioner's request that *he* interrogate the jurors as to their exposure to prejudicial publicity. This the Court acknowledges would have been the preferable practice.

3) It was further concerned that at the conclusion of evidence the trial judge inquired of the jurors as a whole if they had been exposed to prejudicial publicity that would prevent them from rendering an impartial decision based on the evidence. This the Circuit Court pointed out was contrary to its own determination that it is for the Court and not for the jurors themselves to determine whether or not their impartiality has been destroyed by exposure to prejudicial publicity. The opinion indicated that the preferable practice in accordance with the ABA recommendation is to individually question the jurors on this matter.

[36] Flowers was Attorney General of the State of Alabama from 1963 to 1967. In 1966 he conducted a spirited campaign for the governorship of the State, candidly appealing to the black voters of Alabama.

of the pervasiveness of the Flowers-oriented publicity surrounding this case. As revealed by the record and the daily barrage of newspaper headlines and articles, the case assumed a distinct Flowers flavor as it was the subject of numerous references such as the "Flowers Case," "the Flowers Jury," "Flowers' Profit Pact," "Flowers' Trial," "Flowers Fund." Prejudicial headlines[37] improperly characterizing the progress of the case or the evidence that had been presented to the jury such as "Flowers Defense Has Work Cut Out," "Prosecution Busy Tying Loose Ends," "Official Tells Flowers Jury He Got Paid $25,000, Got Fast OK On Stock–Says No Luck Before Deal," constantly interrupted the orderly and impartial procedure of the trial.

At the outset of the trial, because of the extensive pretrial publicity the case had generated, counsel moved for sequestration of the jury. Government counsel was in agreement with this request, but the Court denied the motion. Numerous motions for mis-trial highlighting the nature and extent of the prejudicial publicity surrounding the trial were made by counsel. Even though all such motions were summarily denied it became increasingly evident that the trial judge was concerned about the issue of trial publicity. He admitted that there had been a great deal of publicity involved and that some of it worried him. He acknowledged that there was a definite possibility that the Court might never find out if the jurors had been influenced by prejudicial publicity. He frankly admitted that he was not very happy with one newspaper in particular as it had published a news story contrary to an agreement that he thought he had negotiated with all newspapers.

Two significant additional occurrences are worthy of notice. At the outset of his oral charge to the jury the trial judge inquired of the entire panel as to whether or not

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[37]The following cited headlines were submitted as Defendants' Exhibits during the trial and are part of the record in this case.

they had been exposed to any publicity that would prevent them from deciding the case purely on the evidence.[38] It is respectfully submitted that the overtones of admonition inherent in this charge would not be likely to elicit a voluntary response. Further, Petitioner requested in a motion for a new trial that the Court resummon the jurors for interrogation by counsel as to whether or not they had been affected by trial publicity to such an extent that it would have ruined their impartiality. This motion was summarily denied.

Petitioner respectfully submits that the procedural handling of this case with regard to prejudicial publicity during the course of the trial and after is in urgent need of review by this Court. Further it would seem that the above amassed facts would place the Circuit Court's position squarely in conflict with policies enunciated in *Sheppard v. Maxwell*, 384 U.S. 33; *Marshall v. United States*, 360 U.S. 310; and *Estes v. Texas*, 381 U.S. 532.

It has been conclusively recognized that sequestration is often a necessary step to preserve the impartiality of the jury in cases involving extensive publicity. In addition, in the face of the lack of effective action on the part of the trial court, Petitioner was not required to demonstrate that prejudice had in fact occurred. In this regard Petitioner would not even have had the duty of overcoming any juror's statement that prejudicial publicity had not and would not affect his judgment. Under the foregoing circumstances and under the doctrine of *Estes v. Texas, supra*, it is submitted, that the opinion of the Court of Appeals below was in error.

Finally, in conclusion, Petitioner respectfully asserts that it was improper for the reviewing Court, troubled as it was with the Trial Judge's method of insuring juror protection from extensive publicity, to conclude after the fact and removed from the scene, that such publicity was not prejudicial.

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[38]Appendix, U.S. Court of Appeals for the Fifth Circuit, *United States v. Hyde*, pages 290-291.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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FLOWERS' APPENDIX 1, ET SEQ.

COMPARISON OF OPENING STATEMENTS OF GOVERNMENT PROSECUTOR

STIRONE

* * * * *

Now, how does the Government intend to go about proving this indictment? We are going to prove this indictment beyond any reasonable doubt, ladies and gentlemen of the jury, in five steps. We are going to bring witnesses up here to the witness stand and you are going to see witnesses construct each and every one of these steps which are going to be constructed for your benefit to march along with.

Now, let's take the first step that's going to be constructed. We are going to use four witnesses to construct that first step. In this first step, we are going to show the concrete influence of Nicholas Stirone in Western Pennsylvania as a labor leader.

We are going to show that when Nicholas Stirone spoke, it wasn't a small still voice in the night that was speaking. We are going to show that it was a powerful influential man who didn't have to draw pictures for somebody.

* * * * *

Next, get down to the second step. As we pointed out, this is the Hobbs Act and we have to show that there was some interference with interstate commerce before the Federal Government can step in, so we have got to show interstate commerce.

So the second step is going to show interstate commerce. We are going to have six witnesses. We

FLOWERS

* * * * *

This indictment was brought under Title 18, U.S. Code 1951, called the Hobbs Act. (Tr 431)

* * * * *

The Hobbs Act, as it is commonly called, makes it a Federal Criminal Offense to extort money from someone either through fear of economic loss or fear of threats or bodily harm. And that is the question that you will have to determine as we go along with these incidents is, was money extorted and was it through fear of one of the elements, either economic loss, bodily harm, or what not.

The question of the interstate character will be determined by the Court. (Tr 431-432)

[The prosecutor's reply to counsels for defendants' opening statement included the following.]

* * * * *

We submit it is the Court's function to determine interstate commerce and its effect on it.

THE COURT: At this time I will let it stand.

[Objection.]

* * * * *

In spite of what counsel told you, you might be vitally concerned with all the facts in the case, you need not concern yourself with commerce, interstate commerce affected, impeded, or obstructed.

[Objection.]

* * * * *

are going to show you the broad footprint of interstate commerce in this case. We are going to show that there were plans for the erection of a steel processing plant at Allenport, Pa. This plant was to belong to the Pittsburgh Steel Company. (Transcript of Records and File Copies of Briefs, 1959, Vol. 21; Vol. 2 Transcript of Record 518a-519a.)

Your Honor, that's the Court's function.

THE COURT: It may be. It is impossible.

Well, the Court will instruct you on the law of this case. I believe he will instruct you that it is the Court's function to determine whether or not interstate commerce has been established and affected or impeded or obstructed. If it hasn't, he will take the case away from you. Now, Mr. Redden mentioned about the conspiracy and the fact that the gist of the offense is an agreement. (Tr 471-472)

FLOWERS' APPENDIX 2, ET SEQ.

COMPARISON OF RELEVANT JURY CHARGES

STIRONE

* * * * *

Since it is your exclusive function to decide what the facts are, it will be for you to determine the facts relating to the interstate commerce aspect of this case. It is only if there has been one of these effects on interstate commerce that an offense against the laws of the United States has been committed, because interstate commerce is the basis of the federal jurisdiction in this case.

At the opening of the case, the Government introduced evidence relating to the dredging and shipment of sand which it contends was used in the manufacture of the cement which Mr. Rider used in performing the Ragnar-Benson contract which has been the subject of much testimony in this case.

It is the Government's contention that all or substantially all of the sand so used has been shipped in interstate commerce. It is also the position of the Government that concrete supplied by Mr. Rider containing the sand shipped in interstate commerce was being used in the construction of a plant which, when in operation, would produce articles of steel to be shipped in interstate commerce.

Consider the evidence of the Government on this question in the light of any other circumstances or other evidence bearing on the interstate nature of the shipment of sand or the sand used in making concrete supplied by Mr. Rider and on the use to which the mill under construction would be and was put. Then if you are satisfied beyond a reasonable doubt that the sand had been shipped from another state into Pennsylvania by any means of transportation and was used in making concrete supplied by Mr. Rider and that Mr. Stirone extorted money from Mr. Rider, the alleged extortion would be an act which obstructed, delayed or affected interstate commerce, and the movement of commodities in interstate commerce.

Or if you are satisfied beyond a reasonable doubt that Mr. Rider's concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate commerce and if you also believe that the defendant extorted money from Mr. Rider, you are instructed as a matter of law that there has been a substantial effect on interstate commerce shown by the United States. In other words, if you find the facts to be as the Government contends, inter-

NICK

* * * * *

"If the evidence of the witnesses outlining the effect of stoppage of motion picture industry in St. Louis is to be believed and is believed by you, the result, of course, is direct and substantial interference with or effect upon interstate commerce. It is for you to say whether you believe such evidence, not me. I don't mean by that to cast any aspersions on the evidence at all. As I recall, the evidence was uncontradicted, but that, too, is for you to recall for yourselves."

* * * * *

(Transcript of Records and File Copies of Briefs, 1941, Volume 121, Petition for Writ of Certiorari and Brief In Support Thereof p. 37-38.

HULAHAN

* * * * *

I charge you, as a matter of law, that if you believe the testimony of the Government witnesses with reference to the federal jurisdictional element of interstate commerce involved in this case, that is to say, the Government's testimony with reference to the bringing of various materials, commodities, and equipment, from out of state to the job sites in question in this federal judiciai district, then you are instructed that defendant's activities as shown by the Government's testimony, if you believe the same, did delay, obstruct and affect interstate commerce as that language is used in the statutes under which these charges are brought. That is to say, if you find the facts to be as testified to by the Government's witnesses, the Court has determined as a matter of law that there has been a substantial effect on interstate commerce shown here by the United States and that question is not for your determination. However, before you can find the defendant guilty under any or all of the counts in the indictment you must find beyond a reasonable doubt that the defendant has extorted money or property or conspired so to do, as those terms are defined in the statute and other instructions given you by the Court.

* * * * *

[*Hulahan v. United States*, 214 F.2d 441 (8th Cir., 1954).]

FLOWERS

* * * * *

Now, Ladies and Gentlemen of the jury, it is the duty of the Court and not the jury to determine whether the government's evidence, if believed, establishes that interstate commerce was affected by the conduct of the defendant so as to bring the activities of the defendants within the scope of the Hobbs Act and sustain federal jurisdiction.

I instruct you that if you find from the evidence, beyond a reasonable doubt, that a conspiracy existed as charged in Count One or in Count Two or in both Counts One and Two of the indictment (Tr 4278), and that one of the overt acts charged in each count was committed, that the Court has found, as a matter of law, that the requirements of the Hobbs Act under Section 1951 of Title 18 of the United States Code have been met as to interstate commerce being affected.

Now, you must remember that Count One and Count Two are the conspiracy counts in the indictment. Count Three does not charge a conspiracy, but is what we call a substantive count charging a separate offense under the same section of the Hobbs Act, Section 1951, Title 18, United States Code. Only the defendants Richmond Flowers and Oscar Hyde are charged with an offense in Count Three. This count, as you will note from the indictment, charges Mr. Flowers and Mr. Hyde with extracting the payment of $25,000 from the Paramount Life Insurance Company by and through Edward Held and Thomas Monks with their consent induced by threats of economic loss and fear of the same.

You will remember the testimony of Mr. Held and Mr. Monks in this connection. Mr. Held was the Chairman of the Board of Directors of Paramount of (Tr 4279) Arkansas and Paramount of Alabama. Mr. Held was the first witness to take the stand on Wednesday, January 29. Mr. Monks was the second witness, and, I believe, that Mr. Monks began his testimony on Thursday morning following Mr. Held.

Now, as to Count Three, I charge you that if you find from the evidence, beyond a reasonable doubt, one or more of the defendants named in this count, to be guilty as charged, the Court has found, as a matter of law, that the requirements of the Hobbs Act, that interstate commerce has been affected, has been met by the government's evidence, if believed.

CRIMINAL ANTI-TRUST CHARGE

* * * * *

The Sherman Act is not applicable unless it is first established that there is a restraint or attempted restraint of interstate commerce. Before you can find any of the defendants guilty you must find beyond reasonable doubt that there was such an actual or attempted restraint. You may so find when the allegedly illegal conduct, as charged in the indictment, has a direct impact on goods moving in interstate commerce, which means across state lines, or on goods which are in the flow of commerce, as when the goods are in the state of origin awaiting interstate shipment or in the state of destination on the way to the final consumer.

To restrain interstate trade and commerce means to interfere unreasonably with the ordinary, usual, and freely-competitive pricing or distribution system of the open market in interstate trade and commerce.

A conspiracy may restrain interstate commerce even though some or all of the defendants are not engaged in interstate commerce, and even though some or all of the means employed may be acts wholly within a state, if there is a substantial and direct effect on interstate commerce.

If you find that interstate commerce is restrained, or attempted to be restrained, the amount or degree of restraint is of no significance.

* * * * *

(Federal Jury Practice Instructions, Volume 1, pp. 363-364.)

FLOWERS' APPENDIX 2, ET SEQ.

STIRONE

state commerce has been affected, obstructed and delayed.

* * * * *

(Transcript of Records and File Copies of Briefs, 1959, Volume 21, p. 5 and 6 of Petition for Certiorari.)

NICK

HULAHAN

FLOWERS

Now, Count Four of the indictment comes under the same classification as Count Three, in that no conspiracy is charged in this count; and a separate offense is charged under Section 1951, Title 18, United States Code. All three defendants on trial are charged with an offense under Count Four, Mr. Flowers, Mr. Hyde and Mr. Gantt.

Count Four charges that on or about March 11, 1964,–and right here I think it would be appropriate to instruct you that it is not necessary that (Tr 4280) the proof establish with certainty the exact date of the alleged offense; it is sufficient if the evidence shows, beyond a reasonable doubt, that the offense was committed on a date reasonably near the date alleged. As before stated, Court Four charges that these three defendants did unlawfully and willfully obstruct, delay and affect commerce and attempt to obstruct, delay and affect commerce by extortion, in that they did obtain from Century Discount Corporation of Alabama by and through its officers and agents $59,438.26 with their consent induced by the wrongful use of threats of economic loss and fear of the same. In this count it is charged that the defendant Joe Breck Gantt wrongfully seized customer account records from the offices of the company at Pritchard, Alabama; that a suit was filed on or about March 12, 1964, in the name of Richmond Flowers; that Mr. Hyde told Mr. Robert Brozman, President of Century Acceptance Corporation, that the suit would be dropped and the account records returned if he purchased credit life insurance and public relations services; and that no commensurate services would be performed for the (Tr 4281) payments. It is further charged in Count Four that Mr. Flowers did discuss the suit and return the customer account records after Oscar Hyde and Robert Brozman agreed on the contract.

So that you might recall the testimony in connection with Count Four, I remind you that Mr. Robert Brozman testified on Wednesday, February 5, that he was either in Honolulu or on the way to his home in Kansas City when he received a message by phone to the effect that records had been taken from his office in Pritchard and a suit filed by the attorney general's office. He came straight to Birmingham and went to the office of his attorney here, Levine, Fulford, Gwaltney & Pope; left there and went to his Birmingham office where he received a call by phone from Mr. Harvey Moore. As a result of this call, he met Mr. Moore and was later taken by Mr. Moore to Mr. Hyde's office.

Following the testimony of Mr. Brozman, the manager of the Century Discount office in Pritchard, Mr. Cother Dean Jinright, testified on Thursday, February 6, in connection with the records being removed from the Century office by Mr. Joe Breck (Tr 4282), Gantt and another man.

As to Count Four, I charge you that if you find one or more of the defendants named in this count to be guilty from the evidence presented to you, beyond a reasonable doubt, the Court has found, as a matter of law, that the evidence in connection with Count Four, if believed, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants having affected interstate commerce, and thereby sustaining the Court's jurisdiction within the scope of the Hobbs Act. (Tr 4278-4282)

* * * * *

CRIMINAL ANTI-TRUST CHARGE

1. CONSTITUTION OF THE UNITED STATES: Article 3, Section 2, Clause 3:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. UNITED STATES CODE, Title 18:

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section–

* * * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by

wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

UNITED STATES CODE, Title 28:

§ 1861. Declaration of policy

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.

As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54.

§ 1862. Discrimination prohibited

No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States on accout of race, color, religion, sex, national origin, or economic status.

As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54.

§ 1865. Qualifications for jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on

his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he–

(1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district;

(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

(3) is unable to speak the English language;

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 58.

§ 1867. Challenging compliance with selection procedures

(a) In criminal cases, before the voir dire examination begins, or within seven days after the defendant

discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier, the defendant may move to dismiss the indictment or stay the proceedings against him on the ground of substantial failure to comply with the provisions of this title in selecting the grand or petit jury.

* * * * *

(d) Upon motion filed under subsection (a), (b), or (c) of this section, containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of this title, the moving party shall be entitled to present in support of such motion the testimony of the jury commission or clerk, if available, any relevant records and papers not public or otherwise available used by the jury commissioner or clerk, and any other relevant evidence. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the grand jury, the court shall stay the proceedings pending the selection of a grand jury in conformity with this title or dismiss the indictment, whichever is appropriate. If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title.

3. UNITED STATES CODE: (1964 edition)

28 U. S. C. A.

Sec. 1861. *Qualifications of federal jurors*

"Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless–

(1) He has been convicted in a State or Federal court of record of a crime punishable by imprison-

ment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak, and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

"Sec. 1862. *Exemptions*

"The following persons shall be exempt from jury service:

(1) Members in active service in the armed forces of the United States.

(2) Members of the Fire or Police departments of any State, District, Territory, Possession or subdivision thereof.

(3) Public officers in the executive, legislative or judicial branches of the government of the United States, or any State, District, Territory, or Possession or subdivision thereof who are actively engaged in the performance of official duties."

"Sec. 1863. *Exclusion or excuse from service*

"(a) A district judge for good cause may excuse or exclude from jury service any person called as a juror.

(b) Any class or group of persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice.

(c) No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color."

"Sec. 1864. *Manner of drawing; jury commissioners and their compensation*

"The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive $5 per day for each day necessarily employed in the performance of his duties.

The jury commissioner and the clerk or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

This section shall not apply to the District of Columbia."

"Sec. 1865. *Apportionment within district; additional jury commissioners*

(a) Grand and petit jurors shall from time to time be selected from such parts of the district as the court directs so as to be most favorable to an impartial trial, and not to incur unnecessary expense or unduly burden the citizens of any part of the district with jury service. To this end the court may direct the maintenance of separate jury boxes for some or all of the places for holding court in the district and may appoint a jury commissioner for each such place.

(b) Grand or petit jurors summoned for service at one place for holding court in a district may, if the public convenience so requires and the jurors will not

be unduly burdened thereby, be directed to serve at another place in the same district."

4. RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE:

Instructions:

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71–611, 71–618 and 71–625

OSCAR E. HYDE, JOE BRECK GANTT AND RICHMOND M. FLOWERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A92) is reported at 448 F. 2d 815.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1971. A petition for rehearing was denied on October 7, 1971. The petitions for writs of certiorari were filed on November 3, 5 and 6, 1971.[1] The

[1] The petition of Hyde was filed on November 3, 1971, that of Gantt on November 5, 1971, and that of Flowers on November 6, 1971.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand and petit juries were legally constituted.

2. Whether the trial court erred in instructing the jury that, if the government's evidence was believed, as a matter of law interstate commerce was affected for purposes of the Hobbs Act, 18 U.S.C. 1951.

3. Whether petitioners were denied due process because of newspaper publicity during the trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioners were convicted on two counts of conspiracy to extort, and on substantive counts of extortion in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioners Hyde and Flowers were sentenced to concurrent prison terms of eight years. Additionally, Hyde was fined $10,000 on each of the two conspiracy counts and Flowers was fined $5,000 on each of the four counts on which he was convicted, a total of $20,000 each. Petitioner Gantt was sentenced to suspended, concurrent prison terms of five years on the two conspiracy counts, and he was sentenced to imprisonment for one year and a day on one substantive count. The court of appeals affirmed in a comprehensive opinion, one judge dissenting (Pet. App. A1–A92).

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. A1–A7), showed

that from 1963 to 1967 petitioner Flowers, then Attorney General of Alabama, and others conspired to extort payments from various life insurance companies and small loan companies under threat of the use by Flowers of his official position to prevent the companies from doing business in Alabama. The extortion payments were made under seemingly legitimate contracts for credit life insurance or advisory services which were, in fact, and were known by the parties to be, mere sham contracts for channeling payoffs to petitioners.

ARGUMENT

Petitioners raise again three claims which were fully discussed and rejected in the 66-page majority opinion of the court of appeals: the legality of the selection of the grand jury and the petit jury (Pet. App. A8–A26); the sufficiency of the court's instructions on the issue of interstate commerce (Pet. App. A43–A49); and the effect of newspaper publicity during the trial (Pet. App. A60–A66).

1. Petitioners contend that the grand jury which indicted them was illegally constituted because it was selected by a form of "key man" system and because the letter sent to the "key men" contained a sentence which allegedly added qualifications over and above the statutory standards. Citing *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5), they claim that these factors resulted in serious underrepresentation of Negroes and women. They also claim that the petit jury was illegally constituted because the jury lists were made up solely from voter registration lists

which resulted in a serious underrepresentation of Negroes. Further, they contend that the trial court denied them a hearing on the composition of the petit jury in violation of the Jury Selection and Service Act of 1968.

The court of appeals rejected these contentions because petitioners, despite the fact that they had access to relevant records, presented no factual evidence to make out even a prima facie case of purposeful, systematic exclusion in the selection of either the grand jury or the petit jury.

Petitioners were indicted on August 2, 1968, prior to the effective date of the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.* The "key man" system used to develop the grand jury list was not shown to be designed systematically to exclude any cognizable group. As the court of appeals pointed out, the "key man" system is not *per se* unconstitutional (Pet. App. A20). The two "last-minute" depositions submitted to the trial court by petitioners merely showed that the clerk of the court and his deputy, respectively, estimated that Negroes comprised 6.1 or 10 per cent of the jurors and women 7.4 or 20 per cent, while the 1960 census figures showed that Negroes comprised 20.8 per cent of the adult population of the district and women 52 per cent. (Pet. App. A9). It was unclear whether these estimates related to figures for the jury box, the venire lists, those appearing in response to jury summonses or actual jurors. The clerk also stated that an effort was made to obtain a cross-section of the population. The court found that

the underrepresentation of Negroes and women could be explained by non-discriminatory factors and that the percentages did not represent mere tokenism or "spectacular" underrepresentation which would have shifted the burden of explanation on the issue of the jury composition to the government (Pet. App. A16–A17).

The letter sent to the jury nominators contained the sentence, "I know you will give this matter your very careful consideration, and select only such men and women as you would want to pass on a case involving your life, liberty, or property." As the court below held, this did not, on its face, impose an unconstitutional condition. See *Carter* v. *Jury Commission,* 396 U.S. 320; *Turner* v. *Fouche,* 396 U.S. 346; *Jackson* v. *Morrow,* 404 F. 2d 903 (C.A. 5); *Hunt* v. *United States,* 400 F. 2d 306, 308–309. Moreover, when read in the context of the whole letter [2] and considering the fact that there was no showing that the "key men" were all men or all upper or middle class whites, the letter was clearly not unfair (Pet. App. A21–A22).[3]

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[2] The text of the letter is reproduced at Pet. App. A10, n. 8.

[3] Petitioner Flowers also raises the contention that the use of the 1963 jury list, augmented by the prior 1959 list, excluded all potential jurors under age 25, since the indictment was returned in 1968. He cites *United States* v. *Butera,* 420 F. 2d 564 (C.A. 1), for the proposition that young adults—in that case between 21 and 34 years of age—constitute a cognizable group (Pet. 21–22). However, there, as here, the court found it unobjectionable that the jury box was filled in 1968 with jurors selected from a jury pool last filled in 1963. See *United States* v. *Bryant,* 291 F. Supp. 542, 544 (D. Maine).

For selection of the petit jury the voter registration lists were used as the sole source of names, in accordance with the plan of the District Court for the Northern District of Alabama adopted pursuant to the Jury Selection and Service Act of 1968 and approved by the Fifth Circuit Judicial Council. Petitioners here claim that the use of such lists resulted in an underrepresentation of Negroes because only 55 per cent of eligible Negroes were registered while 88 per cent of eligible whites were registered. At trial, petitioners had objected to the jury venire composition solely on the basis of the exemptions and excuses established in the jury selection plan (Pet. App. in court of appeals at 157–160). Since the categories of excuses and exemptions were reasonable, petitioners alleged no "facts which, if true, would constitute a substantial failure to comply with the provisions of [28 U.S.C. 1867]" (28 U.S.C. 1867(d)) and therefore, contrary to their claim, petitioners were not entitled to a hearing on the issue.[4] Petitioners' challenge with respect to the use of the voter registration lists was not raised at trial, and therefore under the relevant statute (28 U.S.C. 1867e) cannot be considered. In any event the court of appeals properly found that, even assuming the figures to be correct, the resulting representation of Negroes as 14 per cent of the juror source, rather than the 20 per cent which reflected their proportion of the population, did not reflect unconstitutional discrimination.

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[4] The court of appeals pointed out that it was not clear whether petitioners were, in fact, denied a hearing (Pet. App. A24).

2. Petitioners claim that the trial judge's instructions concerning whether their activities affected interstate commerce deprived them of their right to have the jury pass on this issue. The judge charged that if the jury believed the government's evidence,[5] then

[5] The judge's charge to the jury included the following language (Pet. App. A47):

"Now, Ladies and Gentlemen of the Jury, it is the duty of the Court and not the jury to determine whether the government's evidence, if believed, established that interstate commerce was affected by the conduct of the defendant so as to bring the activities of the defendants within the scope of the Hobbs Act and sustain federal jurisdiction.

"I instruct you that if you find from the evidence beyond a reasonable doubt, that a conspiracy existed as charged in Count One or in Count Two or in both Counts One and Two of the indictment, and that one of the overt acts charged in each count was committed, that the Court has found, as a matter of law, that the requirements of the Hobbs Act under Section 1951 of Title 18 of the United States Code have been met as to interstate commerce being affected.

* * * * *

"Now, as to Count Three, I charge you that if you find from the evidence, beyond a reasonable doubt, one or more of the defendants named in this count, to be guilty as charged, the Court has found, as a matter of law, that the requirements of the Hobbs Act, that interstate commerce has been affected, has been met by the government's evidence, if believed.

* * * * *

"As to Count Four, I charge you that if you find one or more of the defendants named in this count to be guilty from the evidence presented to you, beyond a reasonable doubt, the Court has found, as a matter of law, that the evidence in connection with Count Four, if believed, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants having affected interstate commerce, and thereby sustaining the Court's jurisdiction within the scope of the Hobbs Act."

as a matter of law the conduct affected interstate commerce. The court of appeals found that by stressing the words "if believed" in his instructions, the trial judge clearly indicated the jury's function, and the instructions as a whole met the required standards. See *Nick* v. *United States*, 122 F2d 660 (C.A. 8), certiorari denied, 314 U.S. 687; *Hulahan* v. *United States*, 214 F.2d 441 (C.A. 8), certiorari denied, 348 U.S. 856; *United States* v. *Green*, 246 F.2d 155 (C.A. 7), certiorari denied, 355 U.S. 871.

Petitioners stress that affecting interstate commerce is an element of the offense under the Hobbs Act, on which petitioners were entitled to have the jury determine the facts. The majority opinion below, however, is not in disagreement, but points out that while the jury is "to determine whether the facts have been proved," the court "should determine whether the facts alleged meet the statutory requirement of affecting interstate commerce" (Pet. App. A43–A44). As noted, the jury's role as the finder of fact on this issue was repeatedly stressed in the charge by the requirement that the jury must find the facts to be as alleged by the government before the requirement of affecting interstate commerce would be met.

3. Petitioners make no complaint regarding pretrial publicity. They argue that they were denied due process because the trial received extensive newspaper coverage locally, the jury was not sequestered

and the trial judge did not take adequate steps to protect the jury's impartiality.[6] The court of appeals, however, found that it was not necessary to reach the issue of the adequacy of the trial judge's steps, because it found that the newspaper publicity was not prejudicial. The newspaper stories and headlines were not editorial comment on the defendants' guilt nor evaluation of the evidence presented, as in *Sheppard* v. *Maxwell,* 384 U.S. 333, and *Silverthorne* v. *United States,* 400 F. 2d 627 (C.A. 9). The articles here were merely summaries and presentations of trial highlights which could not have prejudiced the jury (Pet. App. A63–A65). See *United States* v. *Manning,* 440 F. 2d 1105, 1112 (C.A. 5), petition for certiorari pending, No. 71–5342; *Gordon* v. *United States,* 438 F. 2d 858, 871–874 (C.A. 5), certiorari denied, October 12, 1971, No. 70–5277. See also *Holt* v. *United States,* 218 U.S. 245, 251.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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HENRY E. PETERSEN,
Acting Assistant Attorney General.

BEATRICE ROSENBERG,
JOHN ROBINSON,
Attorneys.

DECEMBER 1971.

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[6] The trial judge did instruct the jury at the beginning of the trial and at the end of each day that they were not to read news stories or listen to broadcasters about the trial (Pet. App. A60–A61).

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IN THE

Supreme Court of the United States

No. 71-625

RICHMOND M. FLOWERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

I

INTRODUCTORY STATEMENT

The United States in its Brief In Opposition has attempted to submerge as well as eliminate important propositions that Petitioner has submitted to this Court for review by rephrasing the questions presented, restructuring the contentions of Petitioner and, in some instances, by completely ignoring certain critical issues. This reply is devoted to those areas which represent significant aspects of the above-described approach adopted by the Brief In Opposition and serves to even further accentuate the substantial nature of the questions raised by Petitioner Flowers.

II

RESPONSE TO ARGUMENT 1

The Government has endeavored to recast and thereby camouflage the thrust of Petitioner's contentions relating to the systematic and intentional exclusion of young people from the

grand jury drawn from the jury pool in 1968. Significantly, there is no refutation of law or fact relied upon by Petitioner. Rather, citing *United States* v. *Bryant*, 291 F. Supp. 542 (D. Maine 1968) and *United States* v. *Butera*, 420 F.2d 564 (1st Cir. 1970) there is advanced in the ignominious confines of a footnote (fn. 3, p.5 of Opposition) that the question is disposed of because both of those cases held it unobjectionable that a jury box was filled in 1968 from a jury pool filled in 1963.

Ingenuous dispatch of such a serious issue cannot suffice. The Brief in Opposition makes no reference to the fact that the jury pool in the instant case was also comprised of names, 50% of which were selected in 1959, thereby systematically and intentionally excluding from half the pool drawn from in 1968 all eligible persons in the Northern District of Alabama 30 years of age and under. Additionally, no allusion is made to the fact that in 1963 when the jury pool was reconstituted young people from the ages of 21 thru 25 were systematically and intentionally excluded from 50% of the pool by virtue of the inclusion of 7,000 stale names drawn in 1959.

Instead, as stated, it is urged that this Court refuse review of this serious issue based on the decisions of *Bryant* and *Butera, supra.* However, in these cases the defendants did not even allege, much less prove, what Petitioner has undeniably demonstrated to be intentional discriminatory practices. Revealingly, the *Bryant* court at page 549 states:

> In the present cases defendants *do not contend* that the Jury Commission *intentionally discriminated against or excluded from the jury pools any identifiable group.* Nor do they attack the key man system as such or *point to any specific defect either intentional or unintentional, in the methods employed by the Commission in selecting prospective jurors.* But they do take the position that the *percentage disparity* between representation of certain identifiable groups on the jury lists and the representation of these groups *in the population as a whole* requires the conclusion that the necessary result of the

selection methods used was unlawful discrimination. (Emphasis supplied).[1]

Quite the contrary, Petitioner has clearly contended and demonstrated that the jury selection system excluded an identifiable group from the jury pool drawn from in 1968. Petitioner has clearly contended and demonstrated that specific defects existed in the method employed in the jury selection system. Petitioner's contentions are much more compelling than the above-cited percentage disparity which was sufficient to shift the burden to the Government. Petitioner has demonstrated *total* and purposeful exclusion of an eligible identifiable group residing in the Northern District of Alabama in 1968, which unexplained, violates statutory and constitutional requirements.

The Government's argument on the contested language in the key man letter compels a response. The pivotal reliance on *Carter* v. *Jury Commission,* 396 U.S. 320 and *Turner* v. *Fouche,* 396 U.S. 346 (See p. 5 of Opposition) is glaringly insufficient in the instant situation. In those cases state *statutes* which *contained* "relevant qualifications for jurors" were construed. This Court in deciding that those statutes were not unconstitutional on their face found the qualifications included in those statutes to be time-tested, customary requirements of a great many states, the discriminatory application of which, if proven, could be effectively enjoined by federal courts, *Carter, supra* p. 525.

In the instant case, the situation is patently different. The letter sent to the jury nominators appended a unique subjective

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[1] It is to be noted that Judge Gignoux referred only in passing to staleness of names. This condition arose by virtue of the fact that the grand jury in question was drawn in March of 1968 from a jury pool constituted in January of 1963. This was accounted for, as the Jury Commissioner explained, by the fact, that although it was the policy to select pools every third or fourth year, it had been delayed in anticipation of the Jury Selection Act. (See footnote 3, page 544.) In *Butera, supra,* the Circuit Court was not presented with the issue of staleness nor was it considered. cf. In the instant case 50% of the names utilized in reconstituting the pool in 1963 reflected an age of some nine years when the 1963 jury pool was drawn from in 1968.

qualification entirely supplemental to the statutory qualifications, the discriminatory application of which could never be realistically isolated and prevented. *Rabinowitz* v. *United States,* 366 F.2d 34 (5th Cir. 1966), recognizing the evil inherent in these deviations, conclusively foreclosed encroachments of precisely *this* type thereby preserving the Congressionally intended integrity of Federal jury selection statutes.

III

RESPONSE TO ARGUMENT 2

Of paramount importance is the failure of the argument presented relating to Petitioner's first question to refute, deny or even comment upon the issue of the prosecutors' opening statements to the jury, the trial judge's failure to correct them, and his acquiescence therein. The United States merely asserts that "[t]he judge charged that if the jury believed the Government's evidence then as a matter of law the conduct affected interstate commerce." To substantiate this there is a total reliance on the proposition advanced by the majority opinion below that such statement is accurate because the judge stressed the words "if believed" in his instructions and the instructions as a whole met required standards.[2]

Three cases are submitted to this Court as controlling, *Nick* v. *United States,* 122 F.2d 660 (8th Cir. 1941), *cert. denied,* 314 U.S. 687; *Hulahan* v. *United States,* 214 F.2d 441 (8th Cir. 1954), *cert. denied,* 348 U.S. 856; *United States* v. *Green,* 246 F.2d 155 (7th Cir. 1957), *cert. denied,* 355 U.S. 871. (See p. 8 of Opposition). The reliance on these three cases simply serves to highlight and perpetuate the confusion that has occurred by virtue of the prosecutors' and trial court's misapplication of these precedents and the approval by the majority

[2]In footnote 5 (on page 7 of the Brief In Opposition) there is a failure to include very significant and prejudicial summarizing comments in the court's instructions which appear on page 9 and 10 of Flowers' Petition. Also, there is no response to the fact asserted by Petitioner that such instructions were repeated improperly two complete times in response to questions from the jury after they had begun deliberations.

opinion of the court below. In *Nick* the issue was whether the trial court was in error for improperly commenting on the evidence and for injecting an argumentative charge to the jury where the court stated:

> If the evidence of the witnesses outlining the *effect of stoppage of motion picture industry in St. Louis is to be believed and is believed by you,* the result, of course, is direct and substantial interference with or effect upon interstate commerce. (Emphasis supplied).

The Court of Appeals in passing on this challenged instruction rejected the criticism and stated:

> It is not for the jury to determine what is or what is not interstate commerce–that is a question of law. It is for the court to charge the jury that if certain facts covered by the evidence are shown then there is such interference.

The Eighth Circuit Court did not propose, much less sanction, this language as an appropriate instruction.

In *Hulahan* the same Circuit Court similarly rejected an attack upon instructions in a Hobbs Act case which included:

> I charge you, as a matter of law, that *if you believe* the testimony of the Government witnesses with reference to the federal jurisdictional element of interstate commerce involved in this case, *that is to say, the Government's testimony with reference to the bringing of various materials, commodities, and equipment, from out of state to the job sites in question in this federal judicial district,* then you are instructed that defendant's activities as shown by the Government's testimony, *if you believe the same did delay, obstruct and affect interstate commerce* as that language is used in the statutes under which these charges are brought. *That is to say, if you find the facts* to be as testified to by the Government's witnesses, the Court has determined as a matter of law that there has been substantial affect on interstate commerce shown here by the United States and that question is not for your determination. (Emphasis supplied).

In approving the instruction, the Circuit Court stated:

> This instruction amounts to nothing more than a statement that, if the jury believed the evidence of the Government relative to the interstate shipment of materials, commodities and equipment for use by the construction companies, the activities of Hulahan, if they constituted extortion or attempts or conspiracies to extort, would necessarily have affected interstate commerce within the meaning of the statute. We think it was for the court, and not the jury, to determine whether the Government's evidence, if believed, would bring the activities of the defendant within the statute and sustain federal jurisdiction. A similar instruction was challenged in *Nick* v. *United States, supra,* at page 673 of 122 F.2d. In that case the Court said:'* * * It is not for the jury to determine what is or what is not interstate commerce–that is a question of law. It is for the court to charge the jury that if certain facts covered by the evidence are shown then there is such interference.'

Again, the Circuit Court did not propose, much less sanction, this language as an appropriate instruction.

A critical transition which has given rise to the present confusion can be traced to the language and policy statement asserted in footnote 4, on page 5 of the "Brief for the United States in Opposition," *Hulahan* v. *United States* No. 294, October Term, 1954 as follows:

> The contention of petitioner that it is question of fact for the jury whether or not the conduct of petitioner has an 'effect on commerce' is contrary to the law. The question of whether and to what extent the proven extortions, threats to extort and conspiracies to extort affected the proven commerce is a question of law to be resolved by the court and not by the jury. An instruction similar to that given in this case was approved in *Nick* v. *United States,* 122 F.2d 660 (C.A. 8), certiorari denied, 314 U.S. 687, rehearing denied, 314 U.S. 715, 316 U.S. 710.

In *Green, supra,* the Seventh Circuit Court was called upon to review the following language of the charge in a Hobbs Act case which stated:

> [The charge] is a violation by force or threatened force, intimidation of workers or persons concerned in the construction of what is alleged to have been an interstate commerce highway. That is the charge and that is the matter which you must decide here. Now so far as this being an interstate commerce tramway or highway or whatever we may desire to call it, if you believe the testimony of the Government witnesses, it is unquestionably an interstate commerce highway.

The Court in approving that charge stated:

> It was clearly the function of the court to determine whether interstate commerce was affected and whether the court had jurisdiction under the Act. As stated in *Hulahan* v. *United States*, supra, 214 F.2d at page 446: 'We think it was for the court, and not the jury, to determine whether the Government's evidence, if believed, would bring the activities of the defendant within the statute and sustain federal jurisdiction.' See also *Nick* v. *U.S.*, 8 Cir., 122 F.2d 660, 673, * * *. A.L.R. 791.

Clearly, the Circuit Court did not propose, much less sanction, this language as an appropriate jury instruction.

As stressed at the outset, the Government has carefully avoided, as did the majority opinion in the Court of Appeals, the obviously purposeful statement of the Government's position in regard to Hobbs Act cases. At the opening of the trial in the instant case the comments of the prosecutors reflected a clear misapplication and expansion of the language of Circuit Court opinions referenced above and further reflected the Government policy as presented in the statement made by the United States in the *Hulahan* Opposition.

The Government ignores, as the Circuit Court majority opinion does, the far-reaching and detrimental procedures which Judge Rives found to be so fundamentally unfair that it gave rise to a dissenting opinion of some 26 pages devoted primarily to this subject. This can only be viewed as a reaction to practices which shock the conscience of English-speaking people who are devoted to the defense of the right to trial by jury.

IV

RESPONSE TO ARGUMENT 3

The myth and morass of whether as a matter of law a Circuit Court can determine what is or is not prejudicial publicity when removed from the scene, confronted with the troubled proclamations of a struggling trial judge, and hindered by the total absence of adequate steps to protect a jury's impartiality is in urgent need of clarification by this Court.

The high standards of this Court cannot, especially in this instance, condone the proposition that if the prejudicial publicity high water marks of *Sheppard* v. *Maxwell*, 384 U.S. 33 and *Silverthorne* v. *United States*, 400 F2d 627 (9th Cir. 1968) were not precisely achieved that disposes of this issue in this case. (See p. 9 of Opposition). Nor should this Court favorably regard a Circuit Court's action dismissing a claim of prejudicial publicity with the transpicuous reasoning that *Silverthorne*'s, headline, Don's Top Aid Takes Stand – Fail's To Deliver was clearly evaluative giving the impression of a defense having failed while Flowers' headlines, Prosecution Busy Tying Loose Ends and Flowers Defense Has Work Cut Out were examples of nonprejudicial typical reporting.

Petitioner respectfully urges that prejudicial publicity questions must not be decided, *in vacuo*, utilizing subjective judgments derived from the comparison of chimerical gradations of prejudiciality extracted from publicity in any one particular case with publicity from *Sheppard, supra, Silverthorne, supra,* or any other case. It would appear that the question for determination is whether or not trial publicity involved in a particular case *did* prejudicially affect the judgment of the jury involved.

In the instant case, the trial judge was both frustrated and deeply concerned about the probable effect of the publicity on the jury. Some of his reflections on the record reveal that he felt the publicity was prejudicial. In addition, he candidly admitted he did not know how to contend with the problem. Furthermore, even the Circuit Court gave eloquent testimony

to the fact that the methods he did employ during the trial were inadequate.

Both the Circuit Court and the Government completely ignore the contention that it is a matter of consequence that the trial judge summarily denied Petitioner's motion made after the verdict requesting in part the interrogation of jurors regarding prejudicial influence from publicity. Yet, in a trial in which the trial judge himself is concerned about prejudicial publicity what better judicial safeguard could exist, contributing to judicial economy on appeal and in no way prejudicial in itself because of its occurrence after the verdict? A resolution of this question would be of significant precedential value.

V

CONCLUSION

From inception to conclusion Petitioner's cause has been scarred by a succession of seriously prejudicial errors that highlight the manifest injustice permeating the disposition of this case. Orderly progression of the law and the preservation of vintage Constitutional prerogatives of an accused laboriously evolved over centuries of diligent jurisprudence urgently plead for this Court's review.

Respectfully submitted,

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